stronger man, had been thrown through the plaintiff's window. Upon the facts stated, taken in the sense in which we understood them, the defendant is entitled to judgment. 1 Hillard on Torts, ch. 3, 3d ed.; *Losee* v. *Buchanan*, 51 N. Y. 476; *Parrot* v. *Wells*, 15 Wall. 524, 537; *Roche* v. *M. G. L. Co.*, 5 Wis. 55; *Eastman* v. *Co.*, 44 N. H. 143, 156.

Case discharged.

Supreme Court of Indiana.

BOARD OF COMMISSIONERS OF TIPPECANOE COUNTY *v.* REYNOLDS.

In the management of the property, business or affairs of a corporation by the president or directors thereof, they occupy a relation to the stockholders similar to that of trustees to *cestuis que trust*.

Stock in a corporation is the individual property of the owner, which he may sell or dispose of, like any other property, as he may see proper; and the president and directors have no control, power or dominion over it, and no duty to perform in reference to its sale, unless it be to see that proper books and facilities are furnished for its transfer.

In the purchase of stock by a director or president of a corporation from a stockholder, the relation of trustee and *cestui que trust* does not exist between them.

THIS was an action by the appellant against the appellee, commenced in the Tippecanoe Circuit Court, and transferred, on change of venue, to the White Circuit Court.

The facts in the case, as alleged, were in substance as follows:

The county of Tippecanoe was the owner of 570 paid-up shares of the capital stock of the Lafayette and Indianapolis Railroad Company of fifty dollars each, amounting to $28,500. On June 24th 1865, the total amount of the stock of the company was only $250,000. The road had been built mainly from the proceeds of bonds sold, and had by its earnings paid off the bonded debt, and also the floating debt was paid, or means accumulated and on hand with which to pay it. The stock owned by the county was at that time worth $342,000. The defendant was the president of the company and the principal manager of its affairs.

It was alleged by plaintiff that the condition of the company had been concealed by the defendant by failing to declare dividends, and by representations that the stock was not worth its face, and by failing to show the condition of the affairs of the

company. That the plaintiffs were ignorant of the value of the stock, which the defendant knew.

That he represented that the depreciation of the value of the stock had been caused by losses sustained by the company, when he knew that the accumulations of the company were sufficient to pay all debts and losses, and leave the stock eleven hundred per cent. above par. That under these circumstances the defendant, through his agent, Moses Fowler, who was also a director of the company, purchased the stock of the county on said 24th day of June 1865, for the sum of $25,650, being ninety cents on the dollar, and had it transferred to one Wilson to hold as his trustee.

That the defendant was then negotiating to sell the road to the Indianapolis and Cincinnati Railroad Company, and afterwards did sell it for $2,500,000, secured by first-mortgage bonds on the road from Lafayette to Indianapolis, with a further lien on the Indianapolis and Cincinnati road.

Prayer for judgment for $315,350 in different forms and for general relief.

Moses Fowler was originally made a defendant, but as to him the action was dismissed.

Reynolds answered by general denial, and the cause was tried by the court, who made what purported to be a special finding, but which was regarded by the court above as only a general finding, it not appearing to have been made at the request of either party, and not being signed by the judge, and no conclusions of law stated.

The plaintiff moved for a new trial because :—

"1. The finding is contrary to law.

"2. It is not supported by sufficient evidence."

The court overruled this motion, and the plaintiff excepted. Final judgment was then rendered for the defendant on the finding.

The opinion of the court was delivered by

WORDEN, J.—Several errors are assigned, but only three of them are presented and relied upon :—

1. The striking out of a part of the prayer of the complaint.
2. Overruling the motion for judgment on the special finding.
3. Overruling the motion for a new trial.

As to the first point made we think the prayer of the complaint, after striking out the parts referred to in the motion, was sufficient

to authorize the court to give the plaintiff any relief to which he might be entitled under the facts alleged.

There was a prayer for judgment for a specific amount and for general relief. It is decided that when the defendant answers any relief may be granted consistent with the case made by the complaint: *Manlove* v. *Lewis*, 9 Ind. 194; *Resor* v. *Resor*, Id. 347.

With regard to the second point, we have already seen that the special finding was not made at the request of either party; was not signed by the judge; contains no conclusions of law, and, we may add, is not set out in any bill of exceptions. We can, therefore, only regard it as a general finding for the defendant, inasmuch as the court rendered judgment upon it for the defendant: *The Peoria, &c., Co.* v. *Walsor*, 22 Ind. 73; *Smith* v. *Jeffries*, 25 Ind. 377; *Davis* v. *Franklin*, Id. 407.

The merits of the entire case, however, arise upon the question involved in the overruling of the motion for a new trial, which we now proceed to consider, the evidence being in the record.

We may remark here that we have had the benefit of a full and able argument on both sides, both oral and written, by which our labors have been lightened, and we have been greatly assisted in arriving at our conclusions in the case. We have carefully considered the evidence in the cause, and are satisfied that no actual fraud was established in the purchase of the stock by the defendant from the plaintiff. The defendant doubtless knew much more about the condition of the affairs of the company and the value of the stock, both present and prospective, than the plaintiff. He purchased the stock greatly below its real value, as subsequent events established, but he paid the market value at the time, so far as it seems to have had a market value. Had the defendant not been connected with the company as one of its officers, there is nothing in the case that would furnish any reasonable ground to claim that the purchase was in any manner infected with fraud. It is not shown by the evidence that there was any special trust or confidence reposed in the defendant by the plaintiffs, which was violated by the former, or of which he took advantage.

These are the conclusions at which we arrive from the evidence, which is quite voluminous, and cannot be set out without extending this opinion to an inadmissible length. It is very clear, according to the well-established practice of the court, that we cannot disturb the finding of the court below on the ground of actual fraud.

Some other element must enter into the case in order to justify us in disturbing the finding. This brings us to the question which has been chiefly argued by counsel, viz.: Was the defendant, in consequence of being a director and the president of the company, a trustee of the plaintiff as a stockholder, whereby it became his duty as a purchaser of the stock to pay a fair and adequate price for it; to take no advantage of the relation which he bore to the company, or the knowledge acquired thereby, and to disclose to the plaintiff all the material facts within his knowledge, not known to the plaintiff, affecting the value of the stock?

We are of the opinion, upon an examination of such authorities as have been brought to our notice upon the point, that the relation of trustee and *cestui que trust* does not exist in such case. It is said very frequently in the books that the directors of a corporation are trustees of the stockholders, and that the relation of trustee and *cestui que trust*, with its consequences, exists between them. But these expressions must always be understood to have relation to the cases to which they are applied, and not to be of universal application.

It may be conceded that in respect to the property of the corporation, whether it be land, money, securities, capital stock or other property held by the corporation, and the management of its business, the directors are trustees for the stockholders. The action of the directors in respect to the property of the corporation, must affect, to a greater or less degree, the stockholders generally. It has been generally in such cases, or where the action of the directors has affected the whole body of stockholders, that the relation of trustee and *cestui que trust* has been held to exist. In a late case in Pennsylvania, *Spering's Appeal*, 71 Penna. St. 11–20, SHARSWOOD, J., in delivering the opinion of the court says, "It is by no means a well settled point what is the precise relation which directors sustain to stockholders. They are undoubtedly said in many authorities to be trustees, but that as I apprehend is only in a general sense, as we term an agent or any bailee intrusted with the care and management of the property of another. It is certain that they are not technical trustees."

To show the diversity of language employed in different cases, and the necessity of keeping in view the case to which it is applied, we make a short extract from the case of *Smith* v. *Hurd*, 12 Met. 371. It was an action on the case at common law, brought by an

individual holder of shares in an incorporated bank, against the directors, setting forth various acts of negligence and malfeasance through a series of years in consequence of which, as the declaration alleged, the whole capital of the bank was wasted and lost, and the shares of the plaintiff became of no value.

SHAW, C. J., in delivering the opinion of the court said: "There is no legal privity, relation, or immediate connection between the holders of shares in a bank, in their individual capacity on the one side, and the directors of the bank on the other. The directors are not the bailees, the factors, agents or trustees of such individual stockholders." It was held that the action could not be maintained.

A similar decision was made in the case of *Allen* v. *Custis*, 26 Conn. 456. ELLSWORTH, J., in pronouncing the decision of the court said: "Besides, the directors of the bank are the agents of the bank. The bank is the only principal, and there is no such trust for, or relation to a stockholder as has been claimed by the plaintiff. The entire duty of the directors, growing out of their agency is owed to the bank, which, under the charter, is the sole representative of the stockholders, and the legal protector and defender of their property."

It seems to us, however, keeping in view the current of authorities, that notwithstanding the general language employed in the above cases, for some purposes the directors of a corporation stand in a relation similar to that of trustees for the shareholders. This seems to be the case in reference to the management by the directors of the property and general affairs of the corporation. These are matters usually intrusted to the directors, and in respect to which they are empowered to act, and their action affects the whole body of shareholders beneficiary or injuriously in respect to dividends upon, or the value of their stock.

But stock in a corporation held by an individual is his own private property, which he may sell or dispose of as he sees proper, and over which neither the corporation nor its officers have any control. It is the subject of daily commerce, and is bought and sold in market like any other marketable commodity.

The directors have no control or dominion over it whatever: or duty to discharge in reference to its sale and transfer, unless it be to see that proper books and facilities are furnished for that purposes. As the property of the individual holder, he holds it as

free from the dominion and control of the directors as he does his lands or other property. This view is very well illustrated by what was said in the case of *Van Allen* v. *The Assessors*, 3 Wall. 573, in which it was held that shares in the national banks might be taxed by the states. Mr. Justice NELSON, in delivering the opinion of the court, p. 583, said "But, in addition to this view, the tax on the shares is a tax on the capital of the bank. The corporation is the legal owner of all the property of the bank, real and personal; and within the powers conferred upon it by the charter, and for the purposes of which it was created, can deal with the corporate property as absolutely as a private individual can deal with his own."

"This is familiar law, and will be found in every work that may be opened on the subject of corporations. A striking exemplification may be seen in the case of the *Queen* v. *Arnaud*, 9 A. & E. (N. S.) 806. The question related to the registry of a ship owned by a corporation. Lord DENMAN observed, "It appears to me that the British corporation is, as such, the sole owner of the ship. The individual members of the corporation are no doubt interested in one sense in the property of the corporation, as they may derive individual benefits from its increase or loss from its decrease: but in no legal sense are the individual members the owners."

"The interest of the shareholder entitles him to participate in the net profits earned by the bank in the employment of its capital, during the existence of its charter in proportion to the number of his shares; and upon its dissolution or termination, to his proportion of the property that may remain of the corporation after the payment of its debts. This is a distinct independent interest or property, held by the shareholders, like any other property that may belong to him. Now it is this interest which the Act of Congress has left subject to taxation by the states," &c.

Such being the nature of the interest of the stockholder in his stock, and the director having no control, power or dominion over it, or duty to discharge in reference to it beyond the duty devolving upon him to prudently manage the affairs and property of the corporation itself, it seems to us to be very clear that, in the purchase of stock by a director from the holder, the relation of trustee and *cestui que trust* does not exist between them.

The case of *Carpenter* v. *Danforth*, 52 Barb. 582, a very well-considered case, is directly in point.

There Danforth, who was one of the trustees or directors of the corporation, purchased of the plaintiff 136 shares of the stock of the National Bank Note Company, and the purpose of the action was to have the sale declared void, and to have the plaintiff restored to the rights and interests which he would have had if the sale had not been made, upon the ground of fraud and undue influence. It was held, that the relation of trustee and *cestui que trust* did not exist.

Many cases have been cited in which it has been said that the directors of a corporation are trustees for the stockholders; but it has been said generally, if not always, with reference to the management by the directors of the property or business of the corporation itself. We proceed to notice the cases.

The case of *Robinson* v. *Smith*, 3 Paige 222, has no analogy to this. It was there held that the directors of a joint stock corporation who wilfully abuse their trust, or misapply the funds of the company, by which a loss is sustained, are personally liable as trustees to make good that loss; and they are also liable if they suffer the corporate funds to be lost or wasted by gross negligence and inattention to the duties of their trust. In *Verplank* v. *The Merchants' Insurance Company*, 1 Edwards 84, it was held that when a corporation aggregate is formed, and the management and control of its officers are in the hands of directors, the latter become the agents and trustees of the corporators, and a relation is created between the stockholders and those directors, who, as trustees, become accountable for dereliction of duty and violation of trust. The case made by the allegations of the bill was, that the directors had violated the act of incorporation by granting life annuities, without having set apart or appropriated any portion of the capital as an annuity fund; by buying and selling goods and merchandise, it being declared unlawful for the company to deal, use or employ any part of their stock, funds or money in such business, and in buying and selling or investing their money in stock or funded debt.

The case of *Scott* v. *Depeyster*, in the same volume, p. 513, is thus stated by the Vice Chancellor, p. 527, "This is a bill by one of the stockholders of the National Insurance Company in behalf of himself and all others who may come in and contribute to the expenses of the suit, against the president and directors of the same company, in their individual capacities, to compel them, per-

sonally, to account for and make good the losses sustained in the capital stock of the company by the frauds and embezzlements of their secretary."

The statement of the case is sufficient to show that it has no bearing upon the question involved here.

In the case of the *Cumberland Coal & Iron Co.* v. *Sherman*, 30 Barb. 553, it was held that a director of a corporation is the agent or trustee of the stockholders, and as such has duties to discharge of a fiduciary nature, towards his principal; and is subject to the obligations and disabilities incident to that relation.

This was held in reference to a sale of the property of the corporation, the case having no similarity to the one before us.

In *Buist* v. *Wood*, 38 Barb. 181, the relationship of trustee and *cestui que trust* is again asserted, but is in this instance applied to the payment by the directors of the funds of the corporation, to an individual upon a pretended claim, which they knew, or must be presumed to have known, was unfounded.

One more case from New York closes our citations from that state: *Bliss* v. *Matteson*, 45 N. Y. 22.

The following point taken from the syllabus will sufficiently show the nature of the case. "The directors of a corporation are trustees of its stockholders, and in a certain sense, of its creditors, and any agreement to influence the action of such directors for the benefit of others, and to the prejudice of the company, is void."

The *Bedford Railroad Co.* v. *Bowzer*, 48 Penna. 29, decides, also, that the directors of a railroad company are trustees for all the stockholders. We cannot make a more condensed statement of the case to which it was applied than by quoting the following paragraph from the syllabus: "Where a board of directors of a railroad company, after reciting a condition attached to certain subscriptions by the commissioners, resolved that the condition be adopted as the act of the company, that the stock of each subscriber be purchased by the company and the payment of the subscription assumed; that the stock be surrendered, subscription annulled and cancelled by the secretary; such action on the part of the board was irregular and unauthorized, and the cancellation of the subscription in accordance therewith invalid; and it was error on part of the court to charge the jury that if the company had assets sufficient to pay their debts, the cancellation was valid, and released the subscribers, of whom the defendant was one."

This case it will be seen has no features in common with that under consideration.

In *Bayless* v. *Orne*, Freman's C. R. 161, the trust relationship is asserted, and applied to the case of an abuse of their trust by the directors, or waste or misapplication of the funds of the company.

The case of *Hodges* v. *New England Screw Co.*, 1 R. I. 312, holds that the directors of a corporation are liable in equity for a fraudulent breach of trust. The fraud charged related to the management of the business and affairs of the corporation, viz.: "that they took stock in an Iron Company on account of the Screw Company, before two hundred shares had been *bonâ fide* subscribed for; that they and the officer concealed important transactions and papers from the plaintiff, and refused him access to the same; that they paid more than the market price for the rods furnished them by the Iron Company; that they had violated the by-laws of the company; that the business and profits of the company had been diminished by diverting the time and care of its officers to the concerns of the Iron Company, the officers and agents of one company being likewise the officers and agents of the other; and that they had managed the concerns of the two companies with a view to reduce the value of the plaintiff's stock, in order to force him to sell it to them at a greatly diminished price, and retire from the company."

In this case it is clear enough, according to the charges, that the directors might justly be regarded as the trustees of the stockholders, because the wrong charged was all done in the management of the business and affairs of the corporation. The case, however, is totally unlike the one under consideration: *European, &c., Railway Co.* v. *Poor*, 59 Maine 277, holds that if a director of a railroad corporation enter into a contract for the construction of the road of his corporation, he cannot then, nor subsequently, personally derive any benefit from such contract. This we recognise as good law, but it needs no argument to show that it has no application to the case before us.

The case of *Dodge* v. *Woolsey*, 18 How. 331, involves questions entirely foreign to that under consideration here. Dodge was the owner of thirty shares in the Commercial Branch Bank of Cleveland, and he filed a bill in the Circuit Court of the United States for the district of Ohio, against the bank, the directors, and the tax collector, to enjoin the collection of a tax assessed by the

state of Ohio on the bank, upon ground stated in his bill. The Circuit Court enjoined the collection of the tax and the judgment was affirmed.

The case of *Koehler* v. *Black River Falls Iron Company*, 2 Black 715, was a bill in Chancery to foreclose a mortgage purporting to have been executed by the company, to secure the payment of $15,000. The bill, upon the hearing was dismissed. The decree was affirmed upon two grounds. *First*, That the corporate seal was wrongfully affixed to the mortgage. *Second*, That the mortgage had been unjustly obtained, in this: two of the nominal mortgagees were directors of the company; the company was embarrassed and desired to borrow money; at a meeting of the stockholders a resolution was passed authorizing the directors to obtain as large a loan as they could, and secure the same by mortgage on the lands and works of the company. $1200 in money, and $800 in provisions, were received by the company, and for the residue the mortgagees assumed the payment of several debts due from the company in which they, or some of them, were interested.

The court say: "Instead of honestly effecting a loan of money advantageously, for the benefit of the corporation, these directors in violation of their duty, and in betrayal of their trust, secured their own debts, to the injury of the stockholders and creditors. Directors cannot thus deal with important interests intrusted to their management. They hold a place of trust, and by accepting the trust are obliged to execute it with fidelity, not for their own benefit, but for the common benefit of the stockholders. In executing this mortgage, and thereby securing to themselves advantages which were not common to all the stockholders, they were guilty of an unauthorized act, and violated a plain principle of equity applicable to trustees. The directors are trustees or managing partners, and the stockholders are the *cestuis que trust*, and have a joint interest in all the property and effects of the corporation, and no injury that the stockholders may sustain by a fraudulent breach of trust can, upon the general principle of equity, be suffered to pass without a remedy." This is another case in which the wrong imputed to the directors had reference to their management of the affairs of the company.

We now turn to the English cases. A leading one is that of *York and N. M. Railway Co.* v. *Hudson*, 22 L. J. Rep. N. S. Chan. 529; s. c. 16 Beav. 485. The corporation in that case

had been chartered in the reign of William IV. Subsequently in the reign of Victoria, an Act of Parliament was passed authorizing the formation of new lines of railway, and the increase of the capital stock of the company. Accordingly the stock was increased 50,000 shares. Of these shares 37,950 were divided amongst the original stockholders; and the residue, amounting to 12,050, were to be left at the disposal of the directors.

The relief sought in the case related only to a portion of the shares so left at the disposal of the directors. The number of shares in respect to which relief was sought, was 5259. These shares had been sold by Hudson, who was chairman of the company, at a premium, and the object of the suit was to compel him to account for the profit he thus made on the sale of the shares. With reference to the case made, the Master of the Rolls said: "The directors are persons selected to manage the affairs of the company for the benefit of the shareholders. It is an office of trust, which, if they undertake, it is their duty to perform fully and entirely. A resolution by the shareholders, therefore, that the shares or any other species of property should be at the disposal of the directors, is a resolution that it shall be at the disposal of trustees, in other words, that the persons intrusted with the property shall dispose of it within the scope of the functions delegated to them in the manner best suited to benefit their *cestuis que trust.*" This was the case of the disposal of the property of the corporation by a director, for his own benefit. It has no bearing whatever upon the question involved here.

In *The Great Luxembourg Railway Company* v. *Moguay*, 25 Beav. 586, a railway company had furnished a director with a large sum of money to enable him to purchase the "concession" of another line. He purchased it, as it turned out, from himself, he being the concealed owner of it. It was held that the transaction could not stand.

In the case *Ex parte Bennett*, 18 Beav. 359, the directors permitted a class of dissentient shareholders in an embarrassed company to transfer their shares to the company, under a power in the deed, upon payment of a sum of money, which it was arranged should be paid to one of the directors in discharge of a debt due from the company. Held, that the transaction was void, and, on the winding up of the company, that the dissentients still remained shareholders.

The relation of trustee and *cestui que trust* is assumed in the case. The case was put upon the ground that the director had obtained an undue advantage in securing the payment of his debts from an embarrassed company.

The next and last case is that of *Walsham* v. *Stainton*, 1 De Gex, Jones & Smith 678. We cannot state this case in a more concise manner than by transcribing the syllabus.

"Joseph Stainton and Henry Stainton, who were confidential agents of a company, conspired together to depress the selling price of the shares by a system of false accounts and concealment, in order that they might purchase them at an undervalue. By reason of this scheme, fifty-five shares belonging to Garbett were sold much below their real value, fifteen to Joseph Stainton and forty to Henry Stainton. The executor of Garbett, upon discovering the fraud which had been practised, filed his bill against the executor of Joseph Stainton and the executor of Henry Stainton for relief in respect to all the shares.

"The representatives of Joseph Stainton demurred for want of equity and multifariousness. Held, that although Joseph Stainton derived no benefit from the sale of the forty shares at an undervalue, yet as he stood in a fiduciary position towards the shareholders, and was a party to the fraud, he as well as Henry Stainton was liable to Garbett for the real value of the shares, and that his executor was a proper party to a suit in respect of them: Held, also, that as both sales were affected by the same fraud, it was not multifarious to combine the cases as to the fifteen and the forty shares in the same bill."

In this cause there was not only actual fraud on the part of the Staintons, but that fraud, whether committed as agents or officers of the company, consisted of fraudulent acts committed by them in their management of the affairs of the company, whereby the apparent value of the shares was depreciated. The case states that Joseph Stainton was manager of the company at Carron from 1786 to his death in 1825, and his brother Henry Stainton was London agent of the company from 1808 till his death in 1851.

The fraud charged was that Joseph Stainton entered on the books of the company large quantities of goods sold to the Board of Ordnance at prices much less than those actually paid, and invested the difference in his own name in government stock. This was carried on with the help of Henry Stainton, as manager in

London. This fund, called in the bill "The Secret Service Fund," amounted in 1808 to 80,000*l.*, and in 1816 to 120,000*l.* The existence of this fund was not noticed in the books of the company, nor was it known to any member of the company other than the Staintons and the Dawsons until the year 1852; but after that date its existence was discovered, and it was subsequently paid or accounted for to the company. The case, in addition to the fact of actual fraud, falls within the recognised class where the relation of trustee and *cestui que trust* exists.

We have thus noticed all the cases that have been cited upon the question involved. None of them conflict with that of *Carpenter* v. *Danforth*, *supra*, or with the conclusions at which we have arrived, as hereinbefore stated. They are all cases in which the acts of the directors, in respect to which they were held to be trustees of the stockholders, had relation to the property or to the business of the corporation. Such is not the case here.

The judgment below is affirmed with costs.

DOWNEY, C. J., dissenting.—In my opinion the evidence in the record in this case shows that the appellee was guilty of actual fraud in his purchase of the stock of the county in the railroad of which he was a director and the president.

If this were not so, I am clearly of the opinion that he occupied a relation of trust and confidence towards the county, which, under the circumstances disclosed, make him guilty of constructive fraud.

I regard the contract obtained from the county commissioners by the appellee as hard, unconscionable and fraudulent in either view of it, and am therefore of the opinion that the judgment of the Circuit Court should be reversed.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF ALABAMA.[1]

SUPREME COURT OF MICHIGAN.[2]

SUPREME COURT OF NEW JERSEY.[3]

SUPREME COURT OF PENNSYLVANIA.[4]

ACTION.

Waiver of Time.—When a party declines to accept payment or per-

[1] From Hon. Thos. G. Jones, Reporter; to appear in 49 or 50 Ala. Rep.

[2] Abstracts by Henry A. Chaney, Esq., to be reported in full in 27 or 28 Mich.

[3] From G. D. W. Vroom, Esq., Reporter; to appear in 8 Vroom's Rep.

[4] From P. F. Smith, Esq., Reporter; to appear in 73 Penna. State Rep.